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6 **IN THE SUPREME COURT
STATE OF ARIZONA**

7 PETITION TO AMEND RULES 35
8 AND 37, ARIZONA RULES OF CIVIL
9 PROCEDURE
10

No. R-_____

11 Pursuant to Rule 28 of the Rules of the Supreme Court of Arizona, the State Bar of
12 Arizona respectfully petitions the Court to amend Rule 35 of the Arizona Rules of Civil
13 Procedure, which governs physical and mental examinations of persons during discovery.
14 The intent is to amend the Rule so it more closely reflects the procedures that practitioners
15 currently follow and to take into account changes in technology that have occurred since
16 the Rule was last amended in 1992. The proposed amendments would:

- 17 • Eliminate Rule 35(a)'s requirement of a court order to conduct an examination,
18 in favor of merely serving a written notice of examination, which is the
19 procedure that practitioners now typically follow;
20 • Allow for video-recording of an examination as matter of right unless the party
21 or person objecting to it can demonstrate good cause;
22 • Expand the Rule's coverage to explicitly allow for examinations by vocational
23 experts and replace the current Rule's reference to "physician or psychologist"
24 with "suitably licensed or certified examiner," the broader phrase used in Rule
25 35(a) of the Federal Rules of Civil Procedure;
26 • Delete the reference in Rule 35(a) to "blood group," which references out-dated

1 medical technology and may inadvertently suggest a restriction on an
2 examination's protocol; and

- 3 • Eliminate the rarely used "alternative procedure" set forth Rule 35(c) (which
4 applies only where the parties cannot agree on who should conduct an
5 examination) and replace it with a general provision directing that a party or
6 person objecting to an examination must bring a motion for protective order
7 under Rule 26(c).

8 To accommodate these proposed rule changes, the State Bar also proposes
9 amending Rule 37 of the Arizona Rules of Civil Procedure to move the provisions for
10 non-compliance with Rule 35 from Rule 37(b)(2) to Rule 37(f).

11 The proposed amendments to Rule 35 are attached to this petition as Appendix
12 "A." The proposed amendments to Rule 37 are attached as Appendix "B."

13 Discussion

14 **I. ELIMINATION OF THE REQUIREMENT OF A COURT ORDER TO** 15 **CONDUCT AN EXAMINATION UNDER RULE 35.**

16 Currently, Rule 35(a) permits a physical or mental examination to be conducted
17 only if it is authorized by a court order. Few practitioners, however, follow this
18 procedure. Instead, practitioners typically initiate the process by serving a written notice
19 (similar to a notice of deposition) requesting a person's presence for an examination on a
20 specified date and location. Nor is there a need to require a court order for all
21 examinations. In most cases, the need during discovery for a physical or mental
22 examination is not controversial. In those rare cases where a legitimate objection exists, it
23 is not unfair to put the burden on the objecting party or person to seek relief from a court.

24 The proposed amendment to Rule 35(a) would do away with the requirement that
25 all examinations be authorized by a court order, and replace it with a provision
26 authorizing examinations upon service of a written notice. As discussed below (at 6), if a

1 party or the person to be examined objects to the examination, proposed Rule 35(d)
2 provides that he or she could seek a protective order under Rule 26(c).

3 Adoption of these rule changes is consistent with current practice, and would
4 eliminate a requirement that, if most practitioners followed it, would require courts to
5 devote precious time and resources to issuing orders for examinations that the parties
6 often agree must be taken.

7 **II. ELIMINATION OF THE REQUIREMENT OF “GOOD CAUSE” TO**
8 **VIDEO-RECORD A RULE 35 EXAMINATION.**

9 Video-recording an examination may be important in discovery to preserve
10 potentially significant and relevant facets of the examination for later use at trial. But
11 while Rule 35(a) currently allows examinations to be recorded by audiotape, it permits an
12 examination to be video-recorded only “[u]pon good cause shown.”

13 In the past there may have been a legitimate basis to make a distinction between
14 audio-recording and video-recording because videotaping used to entail a complex
15 production that required setting up free-standing cameras, lights and microphones. But,
16 given the developments in technology over the last two decades, such concerns no longer
17 exist. Cameras and/or digital recorders are small, silent, and handheld, and do not require
18 any additional equipment such as lights or microphones. Proceedings can be video-
19 recorded silently by the party’s “representative,” who is entitled to attend the examination
20 as a matter of right under Rule 35. Where the courts have ordered video-recording,
21 sometimes after extensive motion practice, these recordings almost never cause any
22 detrimental effect on the actual examination.¹

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24 ¹ There may be legitimate objections to video-recording a mental examination
25 because of the unique issues presented by psychological injuries and by the
26 communications and interactions between the psychological examiner and the examined
party. A party opposing video-recording on these grounds could either seek a stipulation
not to video-record the examination or file a motion demonstrating good cause not to
video-record the examination. It also should be noted that even under today’s practice,

1 The “good cause” requirement in the current rule also invites unnecessary disputes
2 over video-recording, which has led to an inordinate amount of motion practice in the
3 courts. As “good cause” is not self-defining, trial courts have not always been consistent
4 in their rulings on the issue, encouraging yet additional motion practice in other cases.

5 In the State Bar’s view, it is time for Rule 35 to catch up to the technology. Just as
6 depositions may now be video-recorded, so should Rule 35 examinations. The proposed
7 amendment (set forth in a new Rule 35(b)) would provide that either a video or audio
8 recording may be conducted as a matter of right, subject to a good cause objection. If a
9 party or person has a legitimate objection to video-recording, he or she would be
10 permitted to raise the issue in a motion for protective order under Rule 26(c).

11 It also should be noted that the proposed amended Rule 35(a) would make it clear
12 that the party who records the examination would bear the expense of the recording. This
13 would eliminate any argument that allowing an examination to be recorded would
14 unnecessarily increase the cost of litigation for the non-recording parties.

15 **III. EXPANDING RULE 35 TO INCLUDE EXAMINATIONS BY**
16 **VOCATIONAL EXPERTS AND OTHER “SUITABLY LICENSED OR**
17 **CERTIFIED EXAMINERS.”**

18 Another recurring issue under Rule 35 is whether the Rule permits an examination
19 by vocational experts. Personal injury cases frequently include a claim that an injury has
20 caused long-term damage to a plaintiff’s employability, and expert testimony is frequently
21 offered at trial on that specific issue. For that testimony to be meaningful, however, a
22 vocational expert often will need to conduct an examination of the injured party to
23 determine the extent of disability.

24 Rule 63A of the Rules of Family Law Procedure explicitly allows vocational
25
26 many mental health experts video-record these examinations on their own to ensure they
have a complete record.

1 experts to conduct examinations. Ariz. R. of Family Law P. 63A (a person may be
2 ordered to “submit to a physical, mental or vocational evaluation by a designated expert”).
3 Rule 35(a), in contrast, refers only to “physical or mental” examinations. In the absence
4 of specific authorization in the Rule, whether Rule 35 allows for examinations by
5 vocational experts has been a recurrent, litigated issue over the years, again with
6 inconsistent results in the trial courts.

7 In light of the increasing use of vocational experts in personal injury litigation and
8 to make Rule 35(a) consistent with its counterpart in the Rules of Family Law Procedure,
9 the State Bar believes that Rule 35(a) should be amended to expressly allow examinations
10 to be conducted by vocational experts.

11 The State Bar also recommends that the current Rule’s reference to “a physician or
12 psychologist” be replaced with “a suitably licensed or certified examiner,” the broader
13 phrase used in Rule 35(a) of the Federal Rules of Civil Procedure. Adopting the phrase
14 used in the federal rule would eliminate lingering doubts about whether examinations may
15 be conducted by licensed professionals other than physicians or psychologists. As
16 explained in the Advisory Committee Note to the federal rule, the language was intended
17 “to include other certified or licensed professionals, such as dentists or occupational
18 therapists, who are not physicians or clinical psychologists, but who may be well-qualified
19 to give valuable testimony about the physical or mental condition that is the subject of
20 dispute.” Fed. R. Civ. P. 35, 1991 Amendment. The Committee Note also explains that
21 the use of the word “suitably” was intended to “expressly authorize[]” a court “to assess
22 the credentials of the examiner” to ensure that the examination is appropriate, given the
23 facts of a case and the qualifications of the examiner. *Id.*

24 In the State Bar’s view, broadening the category of professionals who may conduct
25 examinations would aid practitioners and parties in selecting experts who have the best
26 suited qualifications and background to address the issues in a case. At the same time, the

1 amendment would expressly allow a party or person who is subject to a Rule 35 notice to
2 challenge an examiner on the ground that he or she is not “suitable,” given the examiner’s
3 qualifications, the nature of the examination and the issues in dispute.

4 **IV. DELETING RULE 35(A)’S REFERENCE TO “BLOOD GROUP.”**

5 Rule 35(a) currently provides that an examination may be ordered when, among
6 other things, a person’s or party’s “physical condition” is at issue “(including the blood
7 group).” The proposed amendment deletes the reference to “(including the blood group)”
8 because advances in medical technology (such as DNA testing) have made the “blood
9 group” of a party a far less significant issue in most cases. In the State Bar’s view, the
10 remaining language is broad enough to encompass a party or person’s “blood group,”
11 while continuing to capture any future scientific developments. Deleting the phrase also
12 would eliminate any potential argument that the Rule limits an examination’s protocol to
13 older forms of blood group testing.

14 **V. DELETING RULE 35(C)’S “ALTERNATE PROCEDURE” AND** 15 **INCORPORATING THE PROCEDURE FOR MOTIONS FOR** 16 **PROTECTIVE ORDERS UNDER RULE 26(C).**

17 Currently, Rule 35(c) sets forth an “Alternate Procedure” for conducting a physical
18 or mental examination, which calls for examinations to be scheduled by service of a
19 written notice of examination and which provides for judicial resolution of disputes. The
20 provision, however, applies only “[w]hen the parties agree that a mental or physical
21 examination is appropriate but do not agree as to the examining physician or
22 psychologist.” Ariz. R. Civ. P. 35(c). As this area of dispute is only one small subset of a
23 much larger number of disputes that may arise under Rule 35, Rule 35(c) is rarely used
24 and currently serves little purpose.

25 The State Bar proposes deleting Rule 35(c)(1) because it would be supplanted by
26 the proposed amendments to Rule 35(a), which would allow all examinations to be

1 requested by serving a formal notice of examination. It also proposes expanding
2 Rule 35(c)(2) to encompass *all* disputes under Rule 35, and not just disputes where the
3 parties merely cannot agree on who should conduct the examination. As revised and
4 renumbered (to accommodate the adoption of a new Rule 35(b)), Rule 35(d) would direct
5 a party or person who objects to an examination (or some aspect of it) to seek a protective
6 order under Rule 26(c). Additionally, to ensure that the issue is resolved in a timely
7 manner, the proposed rule would require the objecting party or person to file such a
8 motion within 10 days after service of the notice for examination.

9 The State Bar believes that these procedures are a logical extension of the other
10 proposed amendments to Rule 35. Rather than attempt to create a whole new set of
11 procedures for resolving objections to examinations, the express incorporation of
12 Rule 26(c) would provide practitioners with a familiar set of standards under which
13 disputes under the Rule could be resolved.

14 **VI. CONFORMING CHANGES TO RULE 37.**

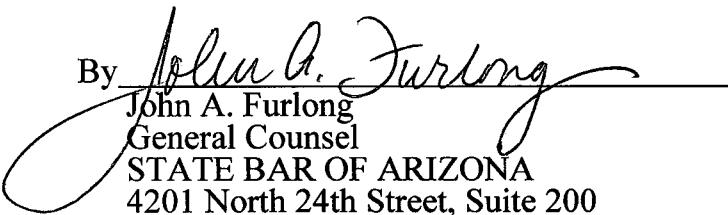
15 If the foregoing proposed amendments are adopted, Rule 37 also would need to be
16 amended to reflect the changes to Rule 35. Currently, sanctions for not complying with
17 Rule 35 are set forth in Rule 37(b)(2), which governs sanctions for failure to comply with
18 a court order. As the proposed amendments to Rule 35(a) would authorize examinations
19 upon service of a notice rather than upon a court order, the sanctions provision now in
20 Rule 37(b)(2) would need to be moved to Rule 37(f), which governs sanctions when a
21 party fails to comply with discovery not involving a court order. The proposed changes in
22 Rule 37 are set forth in Appendix “B,” and, as is shown there, only small stylistic changes
23 are required in the Rule 37(b)(2) sanctions provision to facilitate its insertion into Rule
24 37(f).

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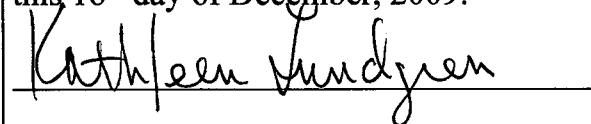
Conclusion

For the reasons set forth above, the State Bar of Arizona respectfully requests that this Court amend Rules 35 and 37 of the Arizona Rules of Civil Procedure in accord with the proposed amendments set forth in Appendices "A" and "B."

RESPECTFULLY SUBMITTED this 18th day of December, 2009.

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Electronic copy filed with the
Clerk of the Supreme Court of Arizona
this 18th day of December, 2009.



APPENDIX “A”

Proposed Amendments to Rule 35

(proposed additions are shown by underscoring and deletions are shown by "strike-through")

1 **Rule 35. Physical, ~~and mental~~ and vocational examinations of persons**

2 **Rule 35(a). Notice Order for Examination**

3 When the mental, ~~or physical~~, or vocational condition (~~including the blood group~~)
4 of a party, or of a person in the custody or under the legal control of a party, is in
5 controversy, any other party may serve written notice on that party and all other parties
6 requiring the court in which the action is pending may order the party to submit to an
7 ~~physical or mental~~ examination by a suitably licensed or certified examiner ~~physician or~~
8 ~~psychologist~~ or to produce for examination the person in the party's custody or legal
9 control. The examination may occur no earlier than 30 days after the notice is served,
10 unless the parties agree otherwise or the court orders an earlier date for good cause shown.
11 ~~The order may be made only on motion for good cause shown and upon notice to the~~
12 ~~person to be examined and to all parties and~~ shall specify the time, place, manner,
13 conditions, and scope of the examination and the person or persons by whom it is to be
14 made. The person to be examined shall have the right to have a representative present
15 during the examination, unless the presence of that representative may adversely affect the
16 outcome of the examination. All fees and costs charged by the examiner, including any
17 additional fees charged by the examiner related to the recording of the examination, shall
18 be paid by the party noticing the examination.

19 **Rule 35(b). Recording of Examination; Objections**

20 Unless good cause is shown, any party may ~~The person to be examined shall have~~
21 ~~the right to record~~ by audio or audio-video means ~~audiotape~~ any physical, mental or
22 vocational examination. Any party who records an examination shall bear the expense of
23 making the recording. ~~A mental examination may be recorded by audiotape, unless such~~
24 ~~recording may adversely affect the outcome of the examination. Upon good cause shown,~~
25 ~~a physical or mental examination may be video recorded.~~ Within five days of service of a
26 notice of a physical, mental or vocational examination, any party intending to record the

1 examination by audio or audio-video means must serve written notice to all parties
2 disclosing that intent. Any party objecting to the video-recording or audio-recording of
3 the examination may move for a protective order under Rule 26(c). A copy of any record
4 made of a physical or mental examination shall be provided to any party upon request.

5 **Rule 35(c)(b). Report of Examiner**

6 (1) If requested by the party [no other proposed changes in rule]

7 **Rule 35(d)(e). ~~Alternate Procedure; Notice of Examination; Objections to~~**
8 **Examination**

9 ~~(1) When the parties agree that a mental or physical examination is appropriate~~
10 ~~but do not agree as to the examining physician or psychologist, the party desiring the~~
11 ~~examination may seek it by giving reasonable notice in writing to every other party to the~~
12 ~~action not less than 30 days in advance. The notice shall specify the name of the person to~~
13 ~~be examined, the time, place and scope of the examination, and the person or persons by~~
14 ~~whom it is to be made. The person to be physically examined shall have the right to have~~
15 ~~a representative present during the examination, unless the presence of that representative~~
16 ~~may adversely affect the outcome of the examination. The person to be examined shall~~
17 ~~have the right to record by audiotape any physical examination. A mental examination~~
18 ~~may be recorded by audiotape, unless such recording may adversely affect the outcome of~~
19 ~~the examination. Upon good cause shown, a physical or mental examination may be~~
20 ~~video-recorded. A copy of any record made of a physical or mental examination shall be~~
21 ~~provided to any party upon request.~~

22 (2) If a party or the person to be examined objects to an examination, that party
23 or person must file a motion for protective order under Rule 26(c) within ten days of the
24 service of the notice for examination. Upon motion by a party or by the person to be
25 examined, and for good cause shown, the court in which the action is pending, may in
26 addition to other orders appropriate under Rule 26(c) subdivision (a) of this rule, make an

1 order that the examination be made by a physician or psychologist an examiner other than
2 the one specified in the notice. If a party after being served with a proper notice under
3 this rule ~~subdivision~~ does not make a motion for protective order ~~under this rule~~ and fails
4 to appear for the examination or to produce for the examination the person in the party's
5 custody or legal control, the court in which the action is pending may on motion make
6 such orders in regard to the failure as are just, such as those specified in Rule 37(d)(f).

7 (3) ~~The provisions of Rule 35(b) shall apply to an examination made under this~~
8 ~~subdivision.~~

APPENDIX “B”

(proposed additions are shown by underscoring and deletions are shown by "strike-through")

1 Rule 37(b). Failure to comply with order

(2) *Sanctions by court in which action is pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule, ~~or Rule 35~~ the court in which the action pending may make such orders in regard to the failure as are just, and among others the following:

8 * * *

~~(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.~~

13 In lieu of any of the foregoing orders or in addition thereto, the court shall require
14 the party failing to obey the order or the attorney advising that party or both to pay the
15 reasonable expenses, including attorney's fees, caused by the failure, unless the court
16 finds that the failure was substantially justified or that other circumstances make the
17 award of expenses unjust.

18

19 **Rule 37(f). Failure of Party to Attend at Own Deposition or Serve Answer to**
20 **Interrogatories or Respond to Request for Inspection or Produce a Person for**
Examination

21 If a party or an officer, director, or managing agent of a party or a person
22 designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear
23 before the officer who is to take the deposition, after being served with a proper notice, or
24 (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper
25 notice of the interrogatories, ~~or~~ (3) to serve a written response to a request for inspection
26 submitted under Rule 34, after proper service of the request, or (4) to submit to, or

1 produce another for, an examination pursuant to Rule 35, after proper notice of the
2 examination, unless the party shows that it is unable to produce such person for
3 examination, the court in which the action is pending on motion may make such orders in
4 regard to the failure as are just, and among others it may take any action authorized under
5 paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in
6 addition thereto, the court shall require the party failing to act or the attorney advising that
7 party or both to pay the reasonable expenses, including attorneys' fees, caused by the
8 failure, unless the court finds that the failure was substantially justified or that other
9 circumstances make an award of expenses unjust.

10 The failure to act as described in this subdivision may not be excused on the
11 ground that the discovery sought is objectionable unless the party failing to act has applied
12 for a protective order as provided by Rule 26(c).